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Aggregation and Settlement of Mass Torts

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Aggregation &

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— BY EDWARD H. COOPER

The following essay is the pre-editing draft of the introduction to a paper delivered at a Mass Torts conference held at the University of Pennsylvania Law School in November 1999. The conference grew out of the work of the ad hoc Mass Torts Working Group that on February 15, 1999, delivered a Report to the Chief Justice of the United States and the Judicial Conference of the United States. The Working Group, chaired by Third Circuit Judge Anthony J. Scirica, '65, included members drawn from several Judicial Conference committees, including the Advisory Committee on the Federal Rules of Civil Procedure, and from the Judicial Panel on Multidistrict Litigation. The Working Group held four public meetings that in all were attended by 81 lawyers, judges, and academics. The models that are discussed in the body of the paper were prepared to stimulate discussion at these meetings and were set out in the Report appendices.

Little need be said about the models themselves. They do not purport to resolve the dilemmas sketched in the introduction. To the contrary, they are designed to underscore the intransigence of the problems that arise from efforts to resolve substantial personal injury or extensive property damage by a substantially common course of conduct. Asbestos and silicone gel breast implants provide the most familiar models, but there have been many others and are likely to be many more.

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It is the way of symposia that conveners assign topics that participants use as an excuse to explore topics that interest the participants. I understand my assignment to be discussion of "non-bankruptcy closure" and "settlement." The work of the Judicial Conference Working Group on Mass Torts suggests approaches that might be taken to facilitate closure of mass tort claims by litigation or by settlement. Much of this paper will explore two models prepared to illustrate the challenges that confront any approach to these goals. The first model is the "All Encompassing Model," while the second is a draft of settlement-class provisions for Federal Rule of Civil Procedure 23. Before exploring the models, however, they provide an excuse for considering many of the reasons for doubt provoked by reflecting on the Working Group's experience. These are equal-opportunity doubts. There are powerful reasons to doubt the virtues of individual litigation of individual claims that arise out of a mass tort. These reasons support exploration of mass aggregation and mass settlement. At the same time, there are powerful reasons to doubt the virtues of mass aggregation and mass settlement. These reasons support the argument for making only modest changes or none at all.

In the end, there will be no firm conclusion. Indeed, not even the doubts will be expressed in firm or fully developed terms. The issues go to the core of adversary civil litigation. They go also to the core of tort doctrine for nonintentional wrongs, the multifarious character of state tort law as applied to conduct and injuries that span the nation, the role of federal courts in choosing and applying state law, the practices of representation that have substituted for individualized litigation, and more. Our received traditions in all of these areas are treasured, and properly so, but none of them fares well when subjected to the test of mass-tort litigation. Only drastic remedies will bring much

change. Even those who are prepared to accept drastic changes that hold strong promise of great benefit may draw back from predicting the benefits that would justify the costs. We may be better advised to pursue small changes, anticipating only small benefits. All that is offered here is support for the argument that the changes that might achieve true coherence are indeed drastic. In some measure, these doubts carry over even to the modest goal of facilitating the hope for global peace through settlement by revising Civil Rule 23 to address the problems that thwarted two brave attempts to establish massive asbestos settlements.

There is a particular reason for setting a high threshold of justification for changes by statute or court rule. Both with and without resort to Civil Rule 23, state and federal courts — prodded by lawyers for plaintiffs and defendants — have proved remarkably inventive in addressing the demands of mass torts. Stratagems accepted as routine today would have been dismissed as unthinkable a scant decade ago. Although there are foundations in court rules and statutes, the process has been very much a common-law process. Often it is observed that each new mass tort presents different problems, requiring different procedural solutions, than any of its predecessors. If that is so, it may be better to leave the judges on the firing lines free to adapt to the new challenges without interference from statutes and rules framed for the last war by the generals in Congress and the tacticians in the rulesmaking committees. There is a risk that lower courts, confronted with overwhelming burdens, may act from expediency rather than principle. But there is a hope that new principles will emerge from their inventive adaptations.

One last prefatory caution is in order. In talking about mass torts, it may seem desirable to offer a definition of the subject. One of the two words, "tort," is easy. The discussion does not involve everything within a broad concept of tort law. We are talking about injuries at the center of traditional tort doctrine: personal injury, and substantial injury to physical property, real or personal. The wrongs defined by modern regulatory legislation — antitrust, securities, and the like — seem different. And even with personal injury, we are seldom dealing with wrongs that are intentional in any but a very refined sense. The second word, "mass," is not so easy. It

would be possible to pick a numerical threshold, and that may be desirable for reform legislation. The number is likely to be rather high. Two hundred fifty actions arising from common facts, or one thousand, may be handled by the collective resources of state and federal courts without significant disruption. The choice of a number, however, must be affected by something more than the impact on the judicial system. It also must take account of the impact on the tort claims. The more drastic the consequences that flow from a mass-tort characterization, the greater the care needed in framing the definition. The broad model described below would have drastic consequences indeed, affecting choice of forum, choice of law, aggregated disposition, and more. Large numbers should be required for this sort of approach. Even for aggregated settlement, many models entail similar consequences in gentler guise. Again, care is warranted.

WE ASK A GREAT DEAL OF TORT THEORY AND JUDICIAL INSTITUTIONS IN TORT LITIGATION. ONE TEST OF AGGREGATING DEVICES IS TO ASK WHETHER, IF WE HAD JUDICIAL RESOURCES FOR THE TASK, IT WOULD BE BETTER TO ENABLE EVERY PLAINTIFF WHO WISHES TO SUE ALONE TO DO SO, AND — IN THE TRADITIONAL MODEL — TO SUE AS MANY TIMES AS THERE ARE DEFENDANTS TO SUE. MANY ARGUMENTS ARE MADE IN FAVOR OF THIS RESULT. THE FORCE OF THESE ARGUMENTS IS AUGMENTED BY THE WEIGHT OF TRADITION. BRIEF REMINDERS OF THE TRADITION SUFFICE TO SET THE SCENE.


I. The Doubts

A. Individual Adjudication of Tort Claims

We ask a great deal of tort theory and judicial institutions in tort litigation. One test of aggregating devices is to ask whether, if we had judicial resources for the task, it would be better to enable every plaintiff who wishes to sue alone to do so, and — in the traditional model — to sue as many times as there are defendants to sue. Many arguments are made in favor of this result. The force of these arguments is augmented by the weight of tradition. Brief reminders of the tradition suffice to set the scene.

Traditionally, the plaintiff begins by choosing a court. The rules of subject-matter jurisdiction, coupled with the reality that most of the central defendants in mass torts are corporations, often give a choice between state and federal courts. Adept framing of the litigation can lock the case into state court. As between state courts, contemporary views of personal jurisdiction and venue often give a substantial range of choice as well. This choice can be exercised to tactical advantage by considering such matters as local aggregation practices (including settlement), jury proclivities and the degree of judicial control, choice-of-law rules,¹¹ docket congestion, and attorney





QUITE A DIFFERENT CHALLENGE TO THE INDIVIDUAL REPRESENTATION MODEL ASKS WHETHER THERE IS ANY REALITY TO THE IMAGE OF INDIVIDUAL REPRESENTATION. THERE ARE, TO BE SURE, SOME ATTORNEYS AND FIRMS WHO LIMIT THEIR INVOLVEMENT IN MASS TORT LITIGATION TO REPRESENTATION OF A SMALL NUMBER OF CLIENTS, TREATING EACH CASE IN MUCH THE SAME WAY AS THE SAME NUMBER OF UNRELATED CASES WOULD BE TREATED.

convenience. Often, putting aside constraining class-action practices, the individual plaintiff chooses as well when to bring suit, whom to associate as co-plaintiffs, and whom to make defendants. Individual plaintiffs also can make choices whether to push for prompt disposition and early relief, whether to emphasize liability or damages, how to pursue discovery, and — often above all — what terms to accept in settlement.

Apart from the effect of these many and elusive choices on outcome, we celebrate the “process values” that go with individual control. The sense of participation and control are believed to affect the level of satisfaction or dissatisfaction with litigation, and the acceptability of the process. We tend to focus on plaintiffs in praising these values, perhaps in part because we — some of us, at any rate — do not care as much about the process-value experience of corporate defendants, and perhaps in part because we believe that defendants who face many adversaries can achieve a substantial measure of participation and control in aggregated litigation in ways that individual plaintiffs do not.

Frank discussion of the charms of individual litigation adds values that represent escape from the cold rationality of legal rules. As to most issues in mass torts, the burden of persuasion is stated as a preponderance of the evidence. The preponderance of the evidence, however, is an extraordinarily fluid concept that is shaped by many subtle factors. The context of specific parties and injuries may have a powerful impact on the willingness of either judge or jury to accept a given level of uncertainty. This flexible response to fact uncertainty joins with equally flexible response to legal uncertainty. Fault, contributory fault, causation, as well as the fancier frills that may decorate tort theory, all bend to individual factors. Such adaptability seems to some to speak ill of the institutions that administer our law, but to many it represents a triumph of justice over law.

This summary recital of the advantages of individual litigation would read to many observers as a recital of disadvantages. To take one narrow illustration, defendants bewail the opportunities plaintiffs often enjoy to select a court, just as plaintiffs decry the occasional opportunities that

defendants seize to defeat a plaintiff's initial choice. When dealing with individualized events that involve no more than a few people, nonetheless, these protests have not led to any general change or prospect of change.

Dissatisfaction with individual adversary litigation of tort claims takes on a new tone when addressed to mass torts. With essentially unique events, we have few ways to measure the correctness of the judgment. It is relatively easy to take it on faith that most judgments are wise. Mass torts, however, support frequent repetition of the litigation experiment. Frequent repetition invites inconsistent results, both on the merits and in measuring damages. The inconsistencies, moreover, are confused by the efforts of both plaintiffs and defendants to manipulate the results by jockeying to bring to trial the cases that seem most favorable as measured by fact, sympathy, law, and tribunal. The inconsistency and manipulability of results leads to regular debates about "maturity." It is regularly suggested that a mass tort becomes mature only through a substantial number of individual trials. When the results begin to converge, maturity is reached and values are established. Until then, the fear is that a single adjudication cannot reliably resolve all claims. The value of repose justifies acceptance of the first fair trial of an individual claim, but not of many claims.

Quite a different challenge to the individual representation model asks whether there is any reality to the image of individual representation. There are, to be sure, some attorneys and firms who limit their involvement in mass tort litigation to representation of a small number of clients, treating each case in much the same way as the same number of unrelated cases would be treated. Many plaintiffs, however, come to be represented by a small number of specialized firms that represent enormous "inventories" of clients. This broad-scale common representation is seen as another form of aggregation, and a form that operates free of the procedural safeguards that surround formal aggregation. In this view, aggregation is a fact and individualized representation for individualized litigation is largely a myth. The only meaningful questions go to the forms of aggregation.

These doubts about the institutional and procedural capacities of courts commingle with doubts about our abstract tort

theories. In part the doubt is whether our institutions and procedure are able to administer our abstract tort theories, either in individualized torts or in mass torts. The administration problems in mass torts, however, also raise substantive questions about the theories themselves.

One of the institutional doubts peculiar to mass torts is the frequently expressed fear that "premature" aggregation will create a mass tort where more sober procedures would show there is none. One version of this fear is that a few plaintiff victories in unusually sympathetic cases brought in particularly favorable forums will stampede many claimants into premature filings, intimidate courts into aggregation, and force capitulation. A more sensible process of repeated trials of typical cases might reveal that there is no mass of victims.

Mass torts do not seem to have much effect on the substantive doubts about the tort theories that define liability-creating conduct. Negligence, product-liability, environment contamination, and like theories are challenged and defended on essentially the same grounds. New point is given, however, to the rules that focus on victims. The point often is made in addressing the "predominance" requirement for certifying a class under Civil Rule 23(b)(3). Questions of causation, plaintiff fault, and damages are treated as unique to each plaintiff, and to predominate over common issues of the defendant's responsibility. But we are driven to ask whether these distinctions really should be made, at least when common injuries are inflicted on thousands, tens of thousands, or even greater numbers of victims. Why, for example, should the "make whole" view of tort law award more money to the victim who had enjoyed the fortune of making more money, and thus has suffered the misfortune of losing a greater stream of future income? How can we possibly presume to distinguish the value of the anguish, pain, suffering, and like intangible injuries of victims who have suffered the same physical impairment? Why should we care that, statistically,

smokers are more likely to be injured by asbestos exposure than nonsmokers: if we cannot trace the causal connection with respect to a particular plaintiff, why take account of the statistical probability — unless it is to support a contribution claim on an aggregated basis by asbestos defendants against tobacco manufacturers? As measured by these traditional notions, it is indeed "weird" that a settlement of blood-solids litigation should award \$100,000 to each victim without accounting for any of these distinctions; a less tradition-bound view might see the result as profoundly wise.

Substantive doubts about tort doctrine bear on aggregation in another way. Different state-law systems threaten to destroy the commonality that supports aggregation, whether by class action or other device. If we become impatient with these obstacles, it is easier to subordinate state-law differences to achieve the advantages of aggregation.

B. Aggregation

Aggregation has many advantages. It offers promise of "a single, uniform, fair, and efficient resolution of all claims growing out of a set of events so related as to be a 'mass tort.'" At least after "maturity" has been achieved, there is a single determination for all parties. The single determination avoids the inconsistencies that arise from separate adjudications, achieving the uniformity — like treatment of like claims — that eludes us, at times as to liability and inevitably as to remedies, when we cling to individual litigation. A once-for-all-who-remain adjudication can command litigating resources and judicial attention in a way that may enhance the prospect of fair disposition. Even if the result is no more fair — if, indeed, even uniformity generates as much unfairness as fairness — it may reduce drastically the costs that attend individual litigation.

The costs of aggregation vary with the form. Voluntary small-scale consolidation by permissive joinder or similar devices presents few problems. Aggregation by inventory was noted earlier. Aggregation by consolidation of actual cases actually filed may seem the next more coercive step. The effect of consolidation, however, is little different from class certification if any substantial number of actions is involved.

Opt-in class aggregation offers an alternative that has found little support.

The possible advantages are not inconsiderable. An opt-out class imposes a burden on the unwilling; the burden includes responsibility to read, understand in a sophisticated way, and respond to the opportunity to request exclusion. The level of informed consent represented by a failure to opt out is likely to be as high in body-injury mass torts as anywhere, but still leaves much to be desired. But "high" may not always be high enough. A claimant who has an attorney may not be given sound advice about the opt-out decision, and many claimants — particularly those who have only "future" claims — may not have attorneys at all. An opt-in class, on the other hand, involves only those whose consent is as real as the consent that personal injury victims give to much of anything in the course of litigating their claims. The class can be certified on terms that avoid many of the problems of an opt-out class, including specification of a choice of law, methods for compensating both class counsel and counsel for those who opt in, methods for resolving individual issues, and so on. An opt-in settlement class might have particularly attractive advantages. The class would in effect involve an offer to settle extended to all victims after negotiation by representatives whose negotiation is likely to be respected. The central objection to this procedure seems to be that it would not work. Too few claimants would choose to opt into a litigation class, and too few would choose to accept the offer of settlement by intervening. The pragmatic view is that a settlement offer would be viewed as a new floor, assuredly available to anyone who fails to opt in but supporting more favorable terms for most. Even a litigation class would have the same effect — no one would opt in, expecting that any class victory would establish a similar floor for later settlements.

Broader and more coercive forms of aggregation entrench the disadvantages that must be set against the potential advantages. Most apparent are the loss of individual control and the risk that the efficiently achieved and uniform result will be wrong. Defendants frequently complain that there is no chance of winning on the merits — even a defendant willing to risk the full damages liability that would follow a fair adjudication of liability settles for fear that the sheer mass of self-identified

victims will overwhelm reason and force a finding of liability. The rewards of successful broad aggregation, moreover, encourage a race to aggregate first, or at least to bring the first aggregated action to judgment.

Class-action aggregation emphasizes the problem of conflicting interests among plaintiffs. The problem exists in any aggregation, but is highlighted by Rule 23 requirements. A searching inquiry into potential conflicts could easily lead to so many subclasses as to defeat any hope of global settlement or a single trial. Conflicts will exist based on differences in extent and character of injuries, optimal choice of law, comparative responsibility, causation, and other easily identifiable positions. Individual victims, given free choice, likely would differ as well with respect to more elusive choices of litigation tactics, most particularly including settlement. Workable control over a thoroughly consolidated proceeding is likely to be achieved only by resolutely ignoring many of these conflicts. This result can be achieved by pretending that the conflicts do not exist, by asserting the advantages of efficiency and discounting the importance of the conflicts, or by forthrightly concluding that many distinctions drawn by traditional tort rules for individualized litigation do not justify recognition of an "interest" that defeats aggregation. With a choice-of-law question, for example, it can be asserted that all relevant laws are essentially the same; that the differences are too trivial to upset efficient disposition; or that the differences do not justly warrant different treatment — that like treatment should be accorded victims from all states.

A very special problem of conflicting interests arises from the desire to defer aggregation to the point at which a mass tort has matured through the pretrial, trial, and settlement of an informative number of individual actions. The lawyers best equipped to manage the later aggregated litigation are those who brought the dispute to maturity. They are the ones we want. But the anticipation of aggregation may make it difficult to handle the individual actions without regard to, and distortion by, the future proceedings. The steps taken to settle individual-client asbestos claims in preparation for settlement of a broad class claim provide a familiar example.

Repeated aggregation of different mass torts creates risks of a different sort. Depending in part on the means of

aggregation, mass torts may come to be dominated by a small number of specialized and well-financed lawyers, litigating before a small number of specialized judges. The results may be similar to the problem of "regulatory capture." All participants know what to expect, and they expect to repeat the strategies that have brought resolution in the past. Tactics may be shaped by the expectation that all players will meet again in future and different mass tort actions. Settlements in particular may reflect received traditions and the expectation of future negotiations.

Effective aggregation, finally, presents severe challenges to received notions of federalism. The challenges are illustrated by the features of the proposed "broad aggregation" model. Most courts are excluded from the action. Choice-of-law traditions are ignored. Common appeal control is asserted even when the aggregation court invokes the assistance of other courts. These challenges will seem daunting to some, but trivial to others.

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